87-55

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TRANSCOAST NAVIGATION, LTD.; MINERALS AND TRANSPORTATION, LTD.; and S/T ATHENA, her boilers, tackle, etc.,

Petitioners,

—v.—

AMERADA HESS CORPORATION and
AMERADA HESS SHIPPING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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July 1987

QUESTION PRESENTED

When arbitrators acted *sua sponte*, and granted an award on grounds not advanced by any party, did the district court lack power to remand the award to them for rehearing?

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IN THE

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TRANSCOAST NAVIGATION, LTD.; MINERALS AND TRANSPORTATION, LTD.; and S/T ATHENA, her boilers, tackle, etc.,

Petitioners,

—v.—

AMERADA HESS CORPORATION and
AMERADA HESS SHIPPING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, Transcoast Navigation, Ltd., Minerals and Transportation, Ltd., and S/T ATHENA respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on April 9, 1987.[1]

---

1 The petitioner corporations, Transcoast Navigation, Ltd. and Minerals and Transportation, Ltd., are privately held companies and have no publicly-owned parents, subsidiaries or affiliates.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Fourth Circuit was entered on April 9, 1987. App. A.[2] The unreported opinions of the United States District Court for the District of Maryland (Hon. James R. Miller, Jr.) were entered on January 17, 1986 and June 11, 1986. App. B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 9, 1987. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 10 of the Federal Arbitration Act (9 U.S.C. § 10) provides, in pertinent part, that a district court may vacate an arbitration award:

> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

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2 References prefixed by "App." are to the Appendix herein. References prefixed by "Ct. App." are to the appendix in the Fourth Circuit.

STATEMENT OF THE CASE

In 1982 the ATHENA was chartered by Petitioners, as Owners, to Respondents Hess, as Charterers, for the carriage of Hess oil from the Virgin Islands to New Jersey and Maryland. During discharge a disgruntled member of the crew secretly contacted Hess and accused the vessel of stealing cargo.

Hess brought an admiralty suit against Owners in the Federal district court in Baltimore. The ship was arrested and thoroughly inspected. An irregular pipe was found cross-connecting the vessel's cargo and fuel systems. Another irregular pipe was found cross-connecting the fuel lines to an oil-stained tank originally designed for boiler water.

Owners explained that the cargo and the fuel systems had been cross-connected at an earlier time when some of the ATHENA's cargo pumps failed and replacement parts were unavailable. The fuel pumps were used to complete discharge of cargoes until the broken cargo pumps could be repaired. The cross-connection was then left in place as a convenient way to transfer tank washings. The old boiler water tank was being used as a slop tank.

Based upon Hess's own records, not a single barrel of cargo was missing. Nonetheless, Hess claimed against Owners for theft and withheld payment of freight and demurrage. The claims were sent to arbitration as provided in the charter.

At the outset the arbitrators granted Owners a partial final award, representing the balance of the freight owed by Hess. App. C1.

In subsequent proceedings, Hess conceded that Owners were entitled to $17,933.98 of demurrage, but disputed owing any more. Ct. App. 140-145. In addition Hess argued that, based upon its calculations of the ship's fuel consumption, some cargo was stolen and burned for fuel. But, Hess made a simple mathematical error in its calculations, which Owners pointed out to the arbitrators. Ct. App. 146-150. With Hess'

mathematical error corrected, the fuel consumption was normal.

The arbitrators handed down a final award with detailed reasons, which is the customary form of award in international maritime arbitration. App. C2. Owners were granted only $13,920.07 in demurrage, i.e. $4,000 less than Hess had conceded it owed. App. C2 p. 42a. Acting *sua sponte*, the arbitrators also made their own calculations of fuel consumption and awarded Hess $21,829.75 for stolen cargo. App. C2 pp. 39a-40a. Finally, Hess was granted $141,670.91 in reimbursement of its attorneys' fees, and all of the $22,848.64 in arbitration fees and expenses were assessed against Owners. App. C2 pp. 43a-45a.

Since the arbitrators were then *functus officio*, they were not authorized to hear reargument about the surprising deficiency in their award of demurrage or their brand new calculations of fuel consumption.

Owners moved before the district court to vacate the award under 9 U.S.C. § 10(c) and (d) on the grounds that the arbitrators had "exceeded their powers" and were guilty of technical "misbehavior" by which Owners' rights were prejudiced. Owners asked the court to remand the award to the arbitrators under 9 U.S.C. § 10(e) for reargument. Hess cross-moved to confirm the award.

The district judge confirmed the award, holding that reargument was only a "procedural nicety" and that he was "without power" to remand because he regarded Owners' objections, to the *sua sponte* actions of the arbitrators, as nothing more than a complaint that they "reached the wrong result from conflicting evidence." App. B1 p. 8a; App. B2 p. 19a. The Court made no findings about whether, by such actions, the "rights of any party have been prejudiced." 9 U.S.C. § 10(c).

Owners appealed. The Fourth Circuit affirmed, holding that although the arbitrators computed the cargo shortage and demurrage "in a fashion not proffered by either party," such calculations did not constitute "arbitral misconduct." App. A.

REASONS FOR GRANTING THE WRIT

Congress and this Court have consistently favored arbitration as an alternative means of dispute resolution for labor and commercial matters. 9 U.S.C. §§ 1-13, 201-209; 29 U.S.C. § 173(d); *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Recently, the Court has demonstrated its support generally for international arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Even before enactment of the Federal Arbitration Act, agreements to arbitrate international maritime disputes, a practice which Justice Brandeis traced to the Fourteenth Century, were vigorously enforced. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 122 n.3 (1924); see *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1931).

Nearly all of this Court's attention has been focused on pre-arbitral issues of arbitrability and appearance of bias, or post-arbitral issues of time bar and scope of judicial review. See, e.g. *Shearson/American Express v. McMahon*, 55 U.S.L. Week 4757 (June 8, 1987) [arbitrability of securities & RICO claims]; *DelCostello v. Teamsters*, 462 U.S. 151 (1983) [vacatur time bar]; *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968) [arbitrator bias]; *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) [arbitrability of fraud claim]; *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) [scope of judicial review]. Other cases, tangential to arbitration, have involved the appealability of court orders entered on applications to enforce arbitration agreements. See *Baltimore Contractors v.*

Bodinger, 348 U.S. 176 (1955); *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454 (1935).

When arbitration was still regulated by common law rather than by statute, Chief Justice John Marshall observed that arbitrators were required to follow a "fair" procedure and especially "to give the parties an opportunity to be heard". *Davy's Executors v. Faw*, 11 U.S. (7 Cranch) 171, 174 (1812); see *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854) [must afford a "full and fair hearing"]. These standards were codified in Section 10(c) of the Arbitration Act which proscribes arbitrator "misbehavior by which the rights of any party have been prejudiced". 9 U.S.C. § 10(c); see *Besser Mfg. Co. v. United States*, 343 U.S. 444, 449 (1952) [arbitral procedures required to be "reasonable and fair"]; *Hines v. Anchor Motor Freight*, 424 U.S. 554, 571 (1976) [arbitration expected to function "within some minimum levels of integrity"].

But this Court has given little guidance to courts and arbitrators about what arbitral activities exceed the bounds of fairness and how to deal with them.

The issue is clearly raised here. As the Fourth Circuit held below, the arbitrators based their award on calculations made *sua sponte*, "in a fashion not proferred by either party". App. A p. 2a. The first that Owners knew about these calculations was after the award was issued, when the arbitrators were already *functus officio*. See *Bayne v. Morris Co.*, 68 U.S. (1 Wall.) 97, 99 (1863); *Teamsters Union v. Desoto*, 725 F.2d 931, 940 (3d Cir. 1984).

The asserted impotence of the district court to remand the proceedings for reargument before the arbitrators, and the refusal of the Fourth Circuit to grant such relief, are contrary to the teachings of other courts—Federal, state, and foreign—which have considered the issue. *Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195 (9th Cir. 1982); *Totem Marine Tug & Barge v. North Am. Towing*, 607 F.2d 649 (5th Cir. 1979); *Confinco v. Bakrie*, 395 F. Supp. 613 (S.D.N.Y. 1975); *Mellon v. Travelers Ins. Co.*, 267 Pa. Super. 191, 406 A. 2d 759 (1979);

Interbulk v. Aiden Shipping Co. (The VIMEIRA), [1984] 2 Ll. L. Rep. 66 (C.A.)

In London, which with New York is one of the two principal maritime arbitration centers, the English Court of Appeal in a similar case unanimously remanded an arbitration award to maritime arbitrators for rehearing, holding that it simply was "not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, whether by calling further evidence or by addressing argument on the facts or the law to the tribunal". [1984] 2 Ll. L. Rep. at 75.

Not only elemental principles of fairness, then, but also considerations of whether the same standards apply to international arbitrations on both sides of the Atlantic, are the important matters meriting review by this Court.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be GRANTED.

Respectfully submitted,

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July 1987

APPENDICES

APPENDIX A

Opinion and Judgment of the Fourth Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 86-3092

AMERADA HESS CORPORATION;
AMERADA HESS SHIPPING CORPORATION,

Plaintiff-Appellee,

—versus—

SS ATHENA, her boilers, tackle, apparel, freights, furniture, etc.; TRANSCOAST NAVIGATION, LTD; MINERALS AND TRANSPORTATION, LTD.,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
James R. Miller, Jr., District Judge.
(CA-82-3553, CA-85-3215)

Argued: February 3, 1987 Decided: April 9, 1987

Before:

WIDENER, CHAPMAN, and WILKINSON,
Circuit Judges.

Michael Marks Cohen (Robert J. Gruendel; Burlingham, Underwood & Lord; Warren B. Daly, Jr.; Ober, Kaler, Grimes & Shriver on brief) for Appellants; Kenneth Geller (Hill, Betts & Nash; James W. Bartlett, III; Kroll, Tract, Harnett, Pomerantz & Cameron on brief) for Appellees.

PER CURIAM:

Our review of this arbitration decision arising out of a claim for shortage is very limited, permitting us to vacate the award only where the arbitrators were guilty of misbehavior or exceeded their powers. 9 U.S.C. § 10 (1970). On matters of fact and law determined by the arbitrators, this court is without power to set aside an arbitration award. *See Cobec Brazilian Trading and Warehousing Corporation of the United States v. Isbrandtsen*, 524 F.Supp. 7 (S.D. N.Y. 1980). The district court, in reviewing the decision of the arbitration panel under this same standard, concluded that the appellant's claim was without merit, as the issues raised by the owners in their motion to vacate were before the arbitrators, and the arbitrators did not refuse to hear any relevant evidence. Although the arbitration panel did compute the amount of shortage and the amount awardable as demurrage in a fashion not proffered by either party, such a calculation does not by itself constitute arbitral misconduct, which can arise where the panel decides an issue not before it. We therefore adopt the reasoning of the district court as set forth in its orders of January 16, 1986 and June 10, 1986, Civil Action Nos. M-82-3553 and M-85-3215, in refusing to vacate the arbitration panel's award of demurrage, shortage, and fees and costs. We decline to assess fees and double costs against the appellant pursuant to Rule 38 of the Federal Rules of Appellate Procedure.

AFFIRMED.

APPENDIX B1

Original Memorandum and Order of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. M-82-3553

AMERADA HESS CORPORATION,

—v.—

S/S ATHENA, et al.

Civil Action No. M-85-3215

TRANSCOAST NAVIGATION, LTD., et al.

—v.—

AMERADA HESS CORPORATION, et al.

MEMORANDUM AND ORDER

In 1983, C.A. M-82-3553 was stayed pending contractually mandated arbitration proceedings (Paper No. 27).[1] Arbitration proceedings have been concluded, and the defendants in C.A.

1 Unless otherwise indicated, all paper numbers noted herein refer to Civil Action No. M-82-3553.

M-82-3553, Transcoast Navigation, Ltd. (Transcoast) and S/S Athena, have filed a Motion to Confirm in Part and to Vacate in Part Two Arbitration Awards (Paper No. 38). Plaintiff in C.A. M-82-3553, Amerada Hess Corporation (Hess), has filed a Motion to Confirm Arbitration Award (Paper No. 44) and an Opposition to defendants' Motion to Confirm in Part and Vacate in Part (Paper No. 43). No hearing is necessary to decide the motions. Local Rule 6(G).

I. *Procedural History*

Hess filed C.A. M-82-3553 on December 10, 1982, alleging that defendants had misappropriated, by means of an irregular pipe connecting the vessel's cargo and fuel oil systems, an unknown quantity of fuel oil which was being transported as cargo on the S/S Athena (Paper No. 1). Hess sought a warrant of arrest against the vessel and requested that its claim be adjudged to be a maritime lien against the vessel. An Order was immediately issued permitting Hess to board the vessel for inspection purposes (Paper No. 7), and on December 11, 1982, the vessel was released, defendants having made alternate arrangements for security (Paper No. 8).

On January 13, 1983, this court concluded at a hearing that probable cause existed for the arrest of the S/S Athena (Paper No. 15). Security was ordered posted in the amount of $230,000.00 by the owners of the vessel, or their representatives, to satisfy any final judgment, settlement, or arbitration. At the hearing, both parties agreed that the claims raised in plaintiff's complaint were subject to arbitration. On April 21, 1983, defendants' Motion to Stay Pending Arbitration, pursuant to 9 U.S.C. § 3 of the Federal Arbitration Act (the Act), 9 U.S.C. § 1 *et seq.*, (Paper No. 17), was granted (Paper No. 27).

Arbitration proceedings were conducted in New York between Hess, as cargo owners; Amerada Hess Shipping Corporation (Hess Shipping), as charterers; Transcoast, as owners of the vessel; and Minerals and Transportation, Ltd. (Mintrans) as disponent owners. On August 26, 1984, the arbitrators issued a Partial Final Award, and on April 30, 1985, the

arbitrators issued a Final Award (Paper No. 38, Appendix, DI and II). On November 12, 1985, this court issued a Memorandum and Order (Paper No. 42) denying as moot a Motion to Stay the confirmation proceedings in this court, filed by Hess (Paper No. 39).

Additionally, because this action did not contain all four parties to the arbitration proceedings, Transcoast and Mintrans have filed a new action in this court, *Transcoast Navigation, Ltd., et al. v. Amerada Hess Corporation, et al.*, C. A. No. M-85-3215, which they request be consolidated with this action. Because Transcoast and Mintrans (hereinafter collectively referred to as "Owners") seek the same relief in both actions (*see* Paper No. 38 and C. A. No. M-85-3215, Paper No. 1), and because neither Hess nor Hess Shipping (hereinafter collectively referred to as "Hess") has objected to this request, the cases will be consolidated.

II. *Arbitration Awards*

The Arbitration Panel (the Panel) issued two awards. In its Partial Final Award (Paper No. 38, Attachment DI), the Panel addressed only the Owners' claim for part of Hess' payment for the freight withheld for cargo retains. The Panel found that Hess, not having provided any evidence as to the ability of the cargo retains to be pumped, had improperly deducted this amount from freight. The Panel required Hess to pay to Owners the amount withheld, $25,389.35, plus interest at 10½%. The Panel's fees up to that date were divided between the parties. This award has previously been paid.

After seven hearings held between April 26, 1983 and December 6, 1983, and the submission of a large number of exhibits, the Panel issued its Final Award (*id.*, Attachment DII), in which it resolved the remainder of the parties' disputes. At that point, the parties were claiming as follows:

Hess against Owners:

a. Cargo allegedly stolen on the last voyage	$53,443.74
b. Cargo allegedly pumpable which remained on the ship after the last voyage	24,890.03
c. Cargo allegedly stolen on five earlier voyages over a seven year period	186,147.00
d. Punitive damages	Treble
e. Attorneys' fees and expenses	141,670.91

Owners against Hess:

a. Demurrage	$37,998.86
b. Interest on late payment of the partial final award	240.24
c. Deadfreight	11,482.17
d. Attorneys' fees and expenses	172,648.99

In the Final Award, the Panel concluded, from the skilled workmanship involved and its concealment beneath the floor plates, that the irregular pipelines were installed as a permanent part of the vessel's cargo system for the purpose of diverting cargo into the bunker tanks. The Panel found no evidence that cargo had been converted prior to the vessel's arrival in Baltimore. Hess' expert witnesses testified, however, that chemical analysis of oil found in Baltimore in the vessel's No. 4 starboard double bottom and the reserve feedwater tank indicated that it came from the same source as the cargo. Based on that testimony the Panel concluded that this oil had been converted from the cargo. Furthermore, after analyzing, by the use of documents submitted as evidence, the consumption of fuel oil in the vessel's boilers between arrival in Baltimore and replenishment of bunkers, the Panel concluded that the vessel had converted and consumed an additional

amount of fuel oil during this time period. In all, the Panel granted Hess' claim for cargo allegedly stolen on the last voyage in the amount of $21,829.75, with interest on this sum at 11.6% per annum from December 11, 1983, the date of the alleged conversion, through April 30, 1985, amounting to $3,510.46.

The Panel denied Hess' claims for allegedly pumpable cargo, for cargo allegedly stolen on earlier voyages, and for punitive damages, but granted in full Hess' claim for attorneys' fees and expenses in the amount of $141,670.91. In addition, the Panel denied Owners' claims for deadfreight and for attorneys' fees and expenses; and granted Owners' claim for demurrage in the amount of $13,920.07, and for interest on Hess' late payment of the partial final award in the amount of $240.24. These damages were to be set off against the sum due Hess from Owners. The Panel also provided that interest shall accrue, if payment was not made within 30 days on the amount assessed for converted cargo, $21,829.75, from the date of the award until payment is made or the award is reduced to judgment, whichever occurred first. The Panel also assessed its fees, in the amount of $20,000, and the cost of the hearing transcripts against Owners.

III. *Confirmation/Vacation*

The scope of judicial review of an arbitration award is limited. Under 9 U.S.C. § 9, "the court must grant . . . an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed in [9 U.S.C. §§ 10 and 11]."[2] *See also Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 707 (2d Cir. 1985); *Hoteles Condado Beach v. Union De Tronquistas Local 901*, 763 F.2d 34, 38 (1st Cir. 1985); *Island Creek Coal Sales Co. v. City of Gainesville, Florida*, 729 F.2d 1046, 1048 (6th Cir. 1984); *Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d 310, 312 (7th Cir. 1981); *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980).

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2 Section 11 provides circumstances under which a court may modify or correct an award. This section is not relevant to this case, as neither party has raised it in support of any motion.

Section 10 provides that the court may vacate an award, upon the application of any party to the arbitration, under the following circumstances:

> "(a) Where the award was procured by corruption, fraud, or undue means.
>
> (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any ~~other~~ misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

In the present case, there is no allegation that any of the arbitrators are guilty of corruption or partiality. Instead, Owners rely on § 10(c)-(e) for their assertion that the award must be vacated.

Federal courts should not review the merits of an arbitration award, as this would undermine the strong policy favoring the settlement of disputes by arbitration. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Furthermore, on matters of fact and law determined by the arbitrators, this court is without power to set aside an arbitration award. See, *e.g.*, *Burchell v. Marsh*, 58 U.S. (17 How.) 344, 349 (1854); *Saxis Steamship Co. v. Multifacs International Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967); *James Richardson & Sons v. W.E. Hedger Transp. Corp.*, 98 F.2d 55, 57 (1938).

On certain parts of the Final Award, both parties agree that the award should be confirmed. These include the Panel's denial of Hess' claims for deadfreight, allegedly pumpable cargo, cargo allegedly stolen on earlier voyages, and punitive damages; and the Panel's granting of Owners' claim for interest on Hess' late payment of the Partial Final Award. Therefore, these portions of the Final Award will be confirmed. The other aspects of the awards are contested, and will be discussed individually.

A. *Actual Conversion of Cargo*

Owners assert that the Panel's conclusion that actual conversion of cargo occurred is incorrect, because the arbitrators incorrectly interpreted the evidence. Owners argue first, that the finding that actual conversion occurred cannot stand because, according to the cargo documents, there was no loss of cargo. Second, Owners challenge the finding that conversion took place during bunkering in Baltimore, in an amount equal to the difference between the vessel's actual consumption, as determined from the vessel's fuel oil meters, and the amount consumed during bunkering as determined by documents indicating, by soundings of the bunker tanks, the amount in the bunker tanks before and after bunkering. Owners contend that an obvious error exists in the document prepared by Hess recording the pre-bunkering survey, upon which the Panel relied in finding an abnormality in consumption of fuel oil during bunkering (Paper No. 38, Appendix A, Exh. N(4)). Third, Owners dispute the Panel's conclusion that a sounding tube was blocked, arguing that this finding was based on evidence which is obviously wrong.

Owners acknowledge that mistakes by arbitrators in their factual findings are not grounds within the statute for vacating the award, *see, e.g., Amicizia Societa Navegazione v. Chilian Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960), but assert that the circumstances of this case constitute "misbehavior" by the arbitrators, within the meaning of § 10(c), or imperfect execution by the arbitrators of their powers, within the meaning of § 10(d). Owners'

arguments, however, do not come within the meaning of those sections, and, therefore, are without merit.

Owners' arguments, as discussed below, amount to assertions that the Panel's conclusions are incorrect, either because they misinterpreted the evidence before them or because they relied on evidence which is contradicted by information which was not in evidence. Such assertions, even if accepted as true by this court, do not constitute "misbehavior" by the arbitrators within the meaning of § 10(c). *See, e.g., Fairchild & Co. v. Richmond, Fredericksburg & Potomac Railroad Co.*, 516 F. Supp. 1305, 1314 (D.D.C. 1981).

While an arbitrator's refusal to hear pertinent evidence may be grounds under § 10(c) for vacating an award, *see, e.g., Cofinco, Inc. v. Bakrie & Bros., N.V.*, 395 F. Supp. 613, 615 (S.D.N.Y. 1975), there is no allegation in the present case that Owners were denied the right to submit evidence which they claimed pertinent.

Furthermore, such assertions are not sufficient to justify reversal under § 10(d), as this section is accorded a narrow reading, especially where its language "has been invoked in the context of arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance." *Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691, 703 (2d Cir. 1978).

Owners' primary argument is that the reasoning applied by the Panel in coming to its conclusion that actual conversion of cargo occurred was not argued by Hess and was, therefore, arrived at *sua sponte* by the Panel. Owners contend that had they known the reasoning which the Panel intended to apply, and been given an opportunity to point out the errors and inconsistency in this reasoning, they would have done so. They argue, in sum, that because the Panel's decision was based on points not argued by counsel, the case should be remanded so that the Owners can point out the errors in reasoning to the arbitrators. This contention, however, is without merit, and the cases cited by Owners do not support their argument.

While it appears that certain evidence, now claimed by the Owners to be available and which may have contradicted evidence on which the Panel relied in concluding as it did, was

not before the Panel, the issues raised by Owners in their motion to vacate were before the arbitrators, and there is no assertion that the Panel refused to hear any evidence which either of the parties claimed was relevant. Indeed, that the Panel held seven hearings and received into evidence an overwhelming number of documents indicates that it permitted the parties substantial leeway in getting any evidence which was relevant to the issues before the Panel.

For example, Owners have argued here that remand is appropriate because the Panel's conclusion that actual conversion occurred is contradicted by the cargo documents which showed no loss. This evidence was before the Panel for whatever weight it felt should be accorded the evidence on that issue. This court cannot reconsider the Panel's decision on the weight to be accorded such evidence.

With respect to bunker consumption at Baltimore, this issue was likewise before the Panel. In fact, Owners noted that: "The key to the fuel consumption at Baltimore is Exhibit N4, a document prepared by Hess which purported to record bunker surveys of the ATHENA on arrival at 0345 on December 10, before bunkering at 1540 on December 11, and after bunkering at 2222 on December 11." (Paper No. 38 at 14-15, referring to Appendix A, Exh. N(4)). This document was in evidence before the Panel, and any inaccuracies in it should have been examined at that time and pointed out to the Panel. Owners assert that this document, upon which the Panel relied in finding that bunker consumption at Baltimore was abnormal, contains an "obvious clerical error" (*id.* at 15), and, therefore, the case should be remanded to the Panel. Nevertheless, Owners acknowledge that: "The document was a puzzle throughout the arbitration." (*Id.*). Owners do not explain their apparent failure to disclose this "obvious clerical error" to the Panel, despite having been given both the time and opportunity, since the issue was raised, in which to do so.

Similarly, Owners question the amount recorded on the Baltimore arrival bunker survey on the same document and theorize that a Hess employee who performed the survey failed to make proper adjustments to his readings (*id.* at 17-18). Owners attribute their failure to discover this error to Hess'

not calling this employee as a witness, thereby preventing Owners from cross-examining him. Although Owners assert that the employee was not identified by Hess until after the hearings had closed, there is no indication that Owners, although contesting the accuracy of the survey, attempted, but were unable, to determine the identity of the employee who performed the survey. Moreover, there is no indication that even after the employee had been identified, Owners made any attempt to question him, nor did they argue to the Panel, despite being permitted to file post-hearing briefs, that they were prejudiced by their failure to cross-examine this employee. Under these circumstances, remand to the Panel so that Owners could now argue this point would be inappropriate under the standard set forth above.

Finally, Owners argue that the Panel's finding that the sounding tube was blocked was based on obviously incredible evidence. Owners acknowledge this issue was argued before the Panel. This court cannot review the Panel's factual finding on this issue.

In sum, Owners' arguments, concerning the Panel's conclusion that actual conversion of cargo occurred, constitute arguments that this court should vacate and remand the case because this finding is contradicted by the evidence. Owners' arguments reduce to an assertion that the Panel reached the wrong result from conflicting evidence. This court may not vacate an arbitration award on that ground. *See Shearson Hayden Stone, Inc. v. Liang*, 653 F.2d at 312.

Furthermore, to the extent that Owners' arguments rely on new evidence, the Act does not allow vacation of an award on this ground. *Id.* at 313. *Cf. Teamsters v. DeSoto, Inc.*, 725 F.2d. 931, 940 (3d Cir. 1984) (newly discovered evidence is not grounds for vacation of an arbitration award under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185); *Washington-Baltimore Newspaper Guild v. Washington Post Co.*, 442 F.2d 1234, 1238 (D.C.Cir. 1971) (same); *Wilks v. American Bakeries Co.*, 563 F. Supp. 560, 563 (W.D.N.C. 1983) (same). Thus, Owners' arguments are without merit, and this part of the Final Award must be confirmed.

B. *Demurrage*

Owners further assert that the Panel's award of only $13,920.07 for demurrage was less than Hess conceded it owed, and that it should be vacated. Hess, however, disputes this assertion and argues that it contested Owners' right to all the demurrage claimed, and that it had contended that Owners' demurrage claim was overstated.

In support of Owners' assertion on this issue, they have attached a page from Hess' Arbitration Brief (Paper No. 38, Apendix D, Exh. IV at 84), containing part of Hess' argument on the demurrage claim. From this page, it appears that Hess argued that Owners had overstated the time during which the vessel was detained in Baltimore, and that if Owners were entitled to any recovery on its demurrage claim, it should not exceed a total of $17,933.98, including demurrage for time during which Hess conceded the vessel was detained in Baltimore. If further appears, however, that Hess argued that, based on the alleged conversion, to the extent Owners claimed demurrage for time during which the vessel lay idle in Baltimore, Owners were not entitled under the Tanker Voyage Charter Party (*id.*, Appendix A, Exh. A) to any recovery on its demurrage claim, because the Owners would have caused the delay. This argument does not constitute an admission by Hess that Owners were entitled to $17,933.98. Therefore, this portion of the award will also be confirmed.

C. *Attorneys' Fees and Arbitration Fees and Costs*

Owners next argue that, excluding attorneys' fees and adding together the Partial and Final Awards, Owners were the net winners in the case, and that they should be allowed to argue to the Panel that this is not an appropriate case in which to assess attorneys' fees and all arbitration fees and costs against them, and, conversely, in which to deny Owners' claim for attorneys' fees. The Panel, having made the award, was aware of the amounts awarded to the parties. It apparently decided that Hess, having prevailed on the central issue from which this case arose, *i.e.*, whether an actual conversion of cargo had occurred, was entitled to its attorneys' fees and Owners ought

to bear the costs of the arbitration. Such a determination is well within the discretion of the arbitrators. Therefore, Owners' argument has no merit and the Final Award will be confirmed in full. As provided in the award, interest will also be awarded on the sum of $21,829.75 from April 30, 1985 up to the entry of judgment in this case.

D. *Partial Final Award*

Owners also seek confirmation of the Partial Final Award. Hess, however, opposes this request. This court need not determine whether the situation presented here, where the Hess corporations are domestic corporations and Owners are foreign corporations, is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) [reprinted as a note following 9 U.S.C. § 201], the enforcement of which is provided for in 9 U.S.C. § 201 *et seq*. To the extent Owners' petition for confirmation of the Partial Final Award is based on the Act, such request is beyond the one year limitations period for making such applications. *See* 9 U.S.C. § 9. To the extent Owners' petition rests upon the Convention, confirmation is barred by their failure to comply with the requirement in Article IV of the Convention that the party applying for enforcement submit, at the time of its application, the duly authenticated original award or a certified copy thereof. Accordingly, Owners' motion will be denied to the extent it seeks confirmation of the Partial Final Award.[3]

IV. *Attorneys' Fees*

Hess claims entitlement to attorneys' fees for its efforts in prosecuting its Motion to Confirm and in opposing Owners' Motion to Confirm in Part and Vacate in Part. Hess asserts that attorneys' fees should be awarded under the standard, set forth in *Local No. 149 v. American Brake Shoe Co.*, 298 F.2d 212 (4th Cir. 1962), that "attorneys' fees should be awarded against a party who, without justification, refuses to abide by

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3 Because Owners' motion on this ground must be dismissed whether under the Act or the Convention, this court need not determine which limitations period is controlling.

the award of the arbitrator." 298 F.2d at 216. *See also Western Electric Co. v. Communication Equipment Workers, Inc.*, 409 F. Supp. 161, 178-79 (D.Md. 1976).

Although this court has found that Owners' arguments that the Panel's decision does not come within the grounds upon which this court may vacate an arbitration award under 9 U.S.C. § 10, this court cannot say that the issue was entirely free from doubt. "In order to hold that a party is refusing to abide by an arbitrator's award without justification, the Court must be satisfied by clear evidence that legal precedent is entirely on the side of the opposing party and that a reasonable person would know the law was completely one-sided." *Western Electric*, 409 F. Supp. at 179. Owners in the present case raised a good faith argument that the arbitrators' decision should be vacated because they based their findings concerning the use of fuel oil during bunkering on a method not argued by the parties. The court is not convinced that the Owners' "desire to submit this question to the Court was frivolous or simply a delaying tactic." *Id.* Therefore, no attorneys' fees will be awarded for Hess' counsel's actions in obtaining confirmation of the Final Award.

Accordingly, it is this 16th day of January, 1986, by the United States States District Court for the District of Maryland, ORDERED:

1. That Civil Action Nos. M-82-3553 and M-85-3215 are hereby CONSOLIDATED for all purposes.

2. That the Motion to Confirm in Part and Vacate in Part Two Arbitration Awards, filed by Transcoast Navigation, Ltd. and S/S ATHENA, is hereby GRANTED in part and DENIED in part as set forth in this Memorandum and Order.

3. That the Motion to Confirm Arbitration Award filed by Amerada Hess Corporation is hereby GRANTED, and judgment is hereby ENTERED in favor of Amerada Hess Corporation in the sum of $153,620.83, plus $2,848.64 for court reporters' fees, plus interest at 11.6% per annum on the sum of $21,829.75 per day from April 30, 1985 to the date of this judgment.

4. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

/s/ JAMES R. MILLER JR.
James R. Miller, Jr.
United States District Judge

APPENDIX B2

Memorandum and Order of the District Court on Reargument

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Civil Action No. M-82-3553

AMERADA HESS CORPORATION

—v.—

S/S ATHENA, et al.

MEMORANDUM AND ORDER

Defendants, Transcoast Navigation, Ltd., Minerals and Transportation, Ltd., and S/S Athena, (hereinafter collectively referred to as "Owners") have filed a motion requesting that this court reconsider its Memorandum and Order confirming the award of the arbitration panel in connection with this matter, and denying defendants' motion to vacate the arbitration award in part (Paper No. 49). Plaintiffs, Amerada Hess Corporation and Amerada Hess Shipping Corporation (hereinafter collectively referred to as "Hess"), have opposed the motion (Paper No. 50). No hearing is necessary. Local Rule 6(G).

Defendants assert first that Hess conceded that Owners were entitled to more demurrage than was awarded by the arbitrators and that this court incorrectly denied them relief on that basis. Owners claimed entitlement to demurrage in a total amount of $40,368.23, but the arbitrators recalculated the

demurrage "because of the extraordinary circumstances surrounding these disputes, which directly impact upon the demurrage claim" (Paper No. 38, Appendix D II at 15). Based on the single page of Hess' Arbitration Brief filed in support of Owners' motion, this court found that it did not appear that Hess had conceded its liability for $17,933.98 (Paper No. 47 at 14). Now, however, Owners have submitted the entire section of Hess' Arbitration Brief devoted to the demurrage issue, which Owners contend admits liability in the amount they claim (Paper No. 49, Exhibit 1). Hess disputes that it admitted such liability.

Even if Hess in its brief did concede liability to such extent, however, this court is without power to set aside an arbitration award on matters of fact and law determined by the arbitrators (Paper No. 47 at 7-8). Owners argue only that the arbitrators incorrectly interpreted the facts. Under the limited scope of judicial review available under the Federal Arbitration Act at 9 U.S.C. §§ 10 and 11, even assuming that Hess had originally admitted demurrage in the amount of $17,933.98, the arbitrators' decision to recalculate the demurrage, based on their perception of the delay and their finding that Owners had converted cargo, is not reviewable.

Owners next argue that the decision of the arbitrators on the issue of theft should be remanded to the arbitrators for reargument, claiming that if the claim had been decided by a court, Owners would have been entitled to move for reargument, and the same should be true in arbitration. In *Burton v. Bush*, 614 F.2d 389 (4th Cir. 1980), in noting that the party to the arbitration of a contract dispute had no right to pre-trial discovery, the Fourth Circuit stated that:

> "An arbitration hearing is not a court of law. . . . When contracting parties stipulate that disputes will be submitted to arbitration, they relinquish the right to certain procedural niceties which are normally associated with a formal trial."

Id. at 390 (citation omitted). The court stated that "such limitations are in keeping with the policy underpinnings of arbitration—speed, efficiency, and reduction in litigation expenses." *Id.*

As with pre-trial discovery, the right to request reconsideration in a court of law is a "procedural nicety" not available under the arbitration procedures which governed the resolution of this dispute.

Finally, Owners contend that the Partial Final Award should have been confirmed, arguing that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") [reprinted as a note following 9 U.S.C. § 201] does not require a certified copy of the award to be filed, because the statutes implementing the treaty, 9 U.S.C. §§ 201-208, do not require that a certified copy of the award be furnished, and because § 208 incorporates 9 U.S.C. § 13(b), which does not require a certified copy. Section 208, however, provides that the provisions of 9 U.S.C. §§ 1-13 apply "to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." The Convention clearly requires that "the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof. . . ." Convention, Article IV, § 1. To the extent that § 13(b) does not require such a certified copy, it conflicts with the Convention, and therefore, the Convention controls. Since no certified copy of the award was filed "at the time of the application," refusal to confirm was proper under the Convention.

In any event, this action is not governed by the Convention. There is apparently no dispute that, although Owners are foreign corporations incorporated in Panama and Bermuda, the Hess companies are domestic corporations, and the arbitration award was rendered in New York City. Article I, § 1 of the Convention provides that it applies to "arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards are sought," and also to

"arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

Since the award in this case was made in this country, the Convention applies only if the award is not considered a "domestic award" in this country. Owners have provided no authority for their implied assertion that this is not a domestic award. One side of this dispute consists solely of two domestic corporations, the arbitral award was made in this country, and this court would have jurisdiction, absent the Convention's existence, to confirm the award if confirmation were sought within the statute of limitations provided under the Federal Arbitration Act in 9 U.S.C. § 9.[1] Under such circumstances, this court is of the opinion that the dispute in this case concerns a "domestic award" governed by the Federal Arbitration Act, not by the Convention. *See Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 35-36 (S.D.N.Y. 1979) (dicta).

The petition to confirm the Partial Final Award was not filed within the one-year time period provided for in 9 U.S.C. § 9. Nevertheless, upon reflection, this court is of the opinion that the Owners should not be precluded from moving for confirmation based on § 9. Courts have held that § 9's language is permissive, and that where justice so requires, actions to confirm will be permitted even after this one-year period has expired. *See Derwin v. General Dynamics Corp.*, 719 F.2d 484, 490 n.5 (1st Cir. 1983); *Kentucky River Mills v. Jackson*, 206 F.2d 111, 120 (6th Cir.), *cert. denied*, 346 U.S. 887 (1953); *Paul Allison, Inc. v. Minikin Storage of Omaha*, 452 F. Supp. 573, 575 (D.Neb. 1978). Here, when the Partial Final Award was issued, the majority of the issues in dispute were still before the arbitrators. Owners waited until the Final Award was issued, and, shortly thereafter, filed their motion to confirm in part and vacate in part. Under these circumstances, the delay does not appear to have been unjustified. Since Hess has raised no

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1 Owners originally sought a stay of this action pending arbitration, under 9 U.S.C. § 3 of the Federal Arbitration Act. Hess admitted that this was proper under § 3 (Paper No. 22), and this court granted Owners' motion (Paper No. 27).

other grounds opposing confirmation of the Partial Final Award, it will be confirmed. In all other respects, the motion for reconsideration is denied.

Accordingly, it is this 10th day of June, 1986, by the United States District Court for the District of Maryland, ORDERED:

1. That the Motion for Reconsideration filed by Transcoast Navigation, Ltd., Minerals and Transportation, Ltd., and S/S Athena is hereby GRANTED in part and DENIED in part as follows:

a) Insofar as this court's Memorandum and Order, dated January 16, 1986, denied the Petition to Confirm the arbitrators' Partial Final Award, that Order is hereby RESCINDED and the Partial Final Award is hereby CONFIRMED.

b) In all other respects, the Motion for Reconsideration is hereby DENIED.

2. That the Clerk mail a copy of this Memorandum and Order to counsel for the parties.

/s/ JAMES R. MILLER, JR.
James R. Miller, Jr.
United States District Judge

APPENDIX C1

Partial Final Award of the Arbitrators

In The Matter of the Arbitration

between

TRANSCOAST NAVIGATION, LTD., as Owners, and MINERALS AND TRANSPORTATION LTD., as Disponent Owners of the

S/T "ATHENA"

and AMERADA HESS SHIPPING CORPORATION, as Charterers and AMERADA HESS CORPORATION, as Cargo Owners

BEFORE:

Mr. Alexis Nichols
Mr. Harry J. Ottaway
Mr. Henry E. Engelbrecht - Chairman

APPEARANCES:

Burlingham, Underwood & Lord
On behalf of Transcoast Navigation, Ltd. and Minerals and Transportation, Ltd.

BY: Michael Marks Cohen, Esq.
Robert J. Gruendel, Esq.
Of Counsel

Hill, Betts & Nash
On behalf of Amerada Hess Shipping Corp. and Amerada Hess Corp.

BY: Kenneth Geller, Esq.
Of Counsel

PARTIAL FINAL AWARD

This arbitration arose as a result of disputes under an STB Voyage Charter Party dated November 24, 1982, between TRANSCOAST NAVIGATION, LTD., as Owners and MINERALS AND TRANSPORTATION, LTD., as Disponent Owners (hereinafter, collectively the "Owners") of the S/T "ATHENA" (hereinafter, the "Vessel"), and AMERADA HESS SHIPPING CORPORATION, as Charterers, and AMERADA HESS CORPORATION, as Cargo Owners (hereinafter, collectively the "Charterers").

PROCEEDINGS

Pursuant to an Order issued by the U.S. District Court for the District of Maryland on January 21, 1983, requiring the parties to arbitrate the disputes or settle them, the Owners appointed Mr. Alexis Nichols and the Charterers appointed Mr. Harry J. Ottaway respectively as arbitrators, and the two so appointed/nominated Mr. Henry E. Engelbrecht as the third arbitrator - Chairman (the "Panel").

Four hearings have been held to-date, four witnesses heard, and numerous exhibits entered into evidence. During the course of the second hearing, Owners requested the Panel to consider and issue a Partial Final Award, relating to a part of the freight withheld for cargo retains. Owners Memorandum and Reply Memorandum and Charterers' Memorandum in opposition to the Partial Final Award, were submitted to the Panel.

The Panel has agreed to issue the requested Partial Final Award, which is the subject of this writing.

BACKGROUND

The Vessel completed loading a cargo of No. 6 oil at the Hess Terminal in The Virgin Islands on December 1, 1982, consisting of 105,557.68 net barrels of ½% sulphur and 187,830.2 net barrels of 1% sulphur, according to the Hess Shore tank loading report. The quantity loaded, according to vessels ullages totaled 105,699 net barrels and 189,379 net

barrels, respectively. The Bills of Lading quantities, issued by the Shipper, indicated that 105,808.5 barrels of 1/2% sulphur and 189,365.67 barrels of 1% sulphur, had been loaded aboard.

Upon arrival at the Mantua, New Jersey anchorage (Delaware River) on December 7, 1982, the Vessels tanks were gauged by Chas. Martin, representing Charterers, with the finding that the quantities aboard did not differ significantly from those measured upon loading. From the anchorage, the Vessel proceeded to the Hess Terminal at Delair, New Jersey and carried out a partial discharge of the 1% sulphur grade and almost all of the 1/2% sulphur grade, sailing for Baltimore on December 9, 1982 with 141,663.4 net barrels of the former grade and 736.5 net barrels of the latter grade still aboard, as determined by Vessels ullages.

According to the Hess Certificate of Unloading at the Hess Terminal in Baltimore, where the Vessel completed on December 11, 1982, a total of 141,225.93 net barrels was received into the shore tanks.

On completion of discharge, the Vessel's cargo tanks were gauged by an independent surveyor, appointed by Charterers, who determined that a total of 843.73 barrels of cargo remained in the tanks. The surveyor's report described this cargo as "free flowing".

In addition to this survey, the Charterers also arranged for inspection of the Vessel's main pump room, fuel oil transfer pump and related piping and certain double bottom and service tanks in the engine spaces. This inspection was carried out on the morning of December 11, 1982 by the same inspection firm which performed the cargo retain survey.

The discovery of an irregular pipeline in the main pump room during the inspection, which connected the cargo system to the fuel oil system and the aforementioned tanks, combined with an apparent short delivery of 2313.81 barrels of cargo, based on Bills of Lading quantities as compared with the quantities received into shore tanks, resulted in the Charterers arresting the Vessel and claiming damages of $30,000 for non-delivered cargo. During the weekend of December 11th and

12th, efforts were made by the parties to reach an agreement on security in order to release the Vessel.

Charterers also increased their claims to include other short deliveries involving the same vessel, and going back several years.

The Vessel was released on December 12, 1982 after Charterers accepted a letter of undertaking from Vessel's P. & I. Club in the amount of $50,000 and a letter from Owners, allowing Charterers to retain all freight owed or earned as security for Charterers' claims which amounted to about $180,000 at this time.

As agreed by the parties, Owners had the right to substitute a new letter of undertaking from the Club in the amount of $230,000, in which case, the freight posted as security would become due and promptly paid.

On January 21, 1983, Charterers' filed an amended complaint in which they alleged short deliveries on six other voyages, which was later reduced to five, and claimed $350,000 in damages, plus $100,000 punitive costs.

Owners' response to Charterers' complaints included a number of counter claims and a demand for arbitration, in accordance with the Charter Party.

On the same date, the District Court ordered Owners to post $230,000 as security in such form as agreed by the parties, and that such security, if in the form of cash, was to be placed in an interest bearing account. The Court also ordered the parties to submit the disputes to arbitration or settle them by December 11, 1983, failing which, security was to be returned.

The aforementioned security, in the form of a letter of undertaking, was finally issued on February 9, 1983 to the Charterers by the Owners P. and I. Club in the Court ordered amount.

Within two days, Charterers released the withheld freight $179,692.83, less $25,389.35 for cargo retains and $12,600 for agency expenses performed by the Charterers, resulting in a net payment to Owners of $141,703.48.

Owners protested the deductions for the cargo retains, stating that the letter of undertaking was intended to secure all the Charterers claims.

Owners also protested the deduction of agency expenses as excessive. Such sums as were in excess were subsequently paid to the Owners with the exception of $400.00 for line handling on a voyage unrelated to these disputes.

Owners now ask for a Partial Final Award for the withheld freight in the amount of $25,389.35 plus interest at 10.77% from January 21, 1983 until paid.

THE APPLICABLE CHARTER PARTY CLAUSE - J16

The Charter Party (Exh. A) contains a retain clause which states as follows:

> "In the event that any cargo remains on board upon completion of discharge, Charterer shall have the right to deduct from freight an amount equal to the F.O.B. port of loading value of such cargo plus freight due with respect thereto, provided that the volume of cargo remaining on board is pumpable or would have been pumpable but for the fault or negligence of the Owner, Master, vessel or her crew, as determined by the independent inspection company surveyor appointed on behalf of the Charterer. The method for measurement and quantity determination of the cargo remaining on board shall be the method of the independent inspection company surveyor appointed by Charterer. Such determination by the independent inspection company surveyor appointed by the Charterer of the quantity of cargo remaining on board the vessel shall be final and binding and the deduction from freight as provided for herein by the Charterer shall release the Owner and the vessel from any further claims with respect thereto. Nothing in this clause shall be construed as an acknowledgement or admission or any pre-determined or standard allowance for an in-transit cargo loss."

THE ARGUMENTS, DELIBERATIONS AND DECISIONS

The Owners contend that the P. and I. letter of undertaking in the amount of $230,000 was intended to cover all the Charterers' claims, and that in effect, Charterers' were allow-

ing themselves double security for a part of their claims by retaining the withheld part of the freight.

The Owners also challenge Charterers' right to deduct for the cargo retains, as based on Charter Party Clause J16, asserting that the Charterer appointed surveyor's determination of the pumpability of the retains is not final and that this issue is a matter for the Panel to resolve.

Charterers rely on Clause J16 to support their right to deduct from freight for cargo retains. Charterers argue that the security was posted for their claims relating to short deliveries and not to the cargo retained onboard in this instance, for which the Charter Party provides the remedy by granting them the right to deduct from freight when the conditions, providing for such deduction, obtain, citing their surveyor's report as final in its determination of the quantity remaining on board and the pumpability of it.

The Panel carefully reviewed all the exhibits, transcripts and memoranda, and finds for the Owners in that Charterers erred in deducting for the retained cargo.

It is clear from the wording of Clause J16 that Charterers have an absolute right to deduct from freight an amount equal to the F.O.B. loading port value plus transportation, for such quantity of cargo retains as may be determined by their surveyor provided, however, that the cargo retains are "pumpable" or would be "pumpable" but for the fault or negligence of the Owner, Master, Vessel or her crew . . . . . .

In the opinion of the Panel, characterization of the material as "pumpable" should be supported by laboratory analysis of representative samples, particularly when dealing with inages of tank bottoms measured in fractions of an inch. . . . "the validity of an R.O.B. claim must be premised upon accurate measurements and proven pumpability of the material, not only within its own characteristics and specifications, but within the designed capability of the Vessel, its pipelines and pumps . . ." BURMAH ENDEAVOR (1545) and AL SAUDIA (1865). ". . . pumpable must mean pumpable by this particular's ship's pumps, not in the abstract . . ." MAROFA (1815). In the absence of such supportive or similar evidence, Charterers fail to prove pumpability. Therefore, Charterers' right to

deduct from freight for the cargo retains, as permitted by Clause J16 given certain provisions, is disallowed.

This Partial Final Award is without prejudice to either Party's right to submit other claims to the Panel and includes the Charterers' right to claim for the retained cargo along with their other claims, all of which claims are secured by the letter of guarantee, as stipulated by the District Court in Baltimore.

Due to insufficient evidence regarding the circumstances pertaining to the $400.00 withheld by Charterers for line-handling on a previous voyage, the Panel defers its decision on this issue and will deal with it in the Final Award.

PARTIAL FINAL AWARD

Charterers are to pay the full amount of the withheld freight plus interest to the Owners as set forth below:

Withheld Freight	$25,389.35
Interest at 10½% from Jan. 21, 1983 to the date of this Award	$ 1,584.92
TOTAL	$26,974.27

Each party shall bear its own expenses up until this date, and share equally the cost of the Court Reporter.

The Panel's fees and expenses for rendering this Partial Final Award are set forth in Appendix "A", attached hereto.

It is the joint and several obligation of the parties to pay these fees and expenses.

APPENDIX "A"

The Panel sets its fees to-date in the amount of $9,000.00 and Chairman's expenses in the amount of $100.00, which are to be paid in equal amounts by the Parties.

Each party is to pay promptly the sum of $1,500.00 to each member of the Panel as fees, and the sum of $50.00 to the Chairman for his expenses.

New York, New York
August 26, 1983

If this Award is not paid within thirty (30) days of the date of the Award, interest shall resume from the date of the Award until payment is made, or the Award is reduced to judgement, whichever first occurs.

/s/ ALEX NICHOLS
Alex Nichols

/s/ HARRY J. OTTAWAY
Harry J. Ottaway

Henry E. Engelbrecht
Chairman

New York, New York
August 26, 1983

This is to certify that this is a true and exact copy of Award No. 1874 of the Society of Maritime Arbitrators, Inc.

Sally Sielski, Asst. Secretary
1/27/86

APPENDIX C2

Final Award of the Arbitrators

In The Matter of the Arbitration

between

TRANSCOAST NAVIGATION, LTD., As Owners and MINERALS AND TRANSPORTATION LTD., As Disponent Owners of the

S/T "ATHENA"

and AMERADA HESS SHIPPING CORPORATION, As Charterers and AMERADA HESS CORPORATION, As Cargo Owners

BEFORE:

Mr. Alexis Nichols
Mr. Harry J. Ottaway
Mr. Henry E. Engelbrecht, Chairman

APPEARANCES:

Burlingham, Underwood & Lord
On behalf of Transcoast Navigation, Ltd. and Minerals and Transportation, Ltd.

BY: Michael Marks Cohen, Esq.
Robert J. Gruendel, Esq.
Of Counsel

Hill, Betts & Nash
On behalf of Amerada Hess Shipping Corp. and Amerada Hess Corp.

BY: Kenneth Geller, Esq.
Of Counsel

This is the Final Decision and Award, pursuant to the Partial Final Award, S.M.A. No. 1874, dated August 26, 1983, New York, New York, concerning the S/T "ATHENA".

PROCEEDINGS

Subsequently, three (3) more hearings were held, additional witnesses were heard, additional voluminous exhibits and affidavits were entered into evidence and post hearing and reply briefs exchanged.

The various other Charterers' claims, including the retained cargo, and the Owners' claims, will now be considered.

BACKGROUND

Pursuant to the STB Charter Party, the Vessel arrived at St. Croix and tendered at 0001 hours on November 28, 1983 to load two grades of No. 6 oil of 1% and 1/2% sulphur content, each to be segregated from the other. The Charter Party described the summer draft as 39' 07-5/8" and capacity for cargo as 47.500 long tons, plus/minus 5%, Owners' option. Owners requested suppliers for maximum possible cargo of 49.875 long tons.

After several changes of orders from Charterers, the Vessel was instructed to load 200,000 barrels of 1% sulphur No. 6 oil for discharge at Delair, New Jersey and the balance 1/2% sulphur for discharge at the Hess Terminal in Baltimore, Maryland. The same instructions required the Vessel to arrive at the Delaware on 39 feet evenkeel, salt water draft. Because the 1% sulphur cargo was a fixed quantity, it had to be loaded first and the 1/2% last.

During the pre-loading tank inspection by Petroleum Inspectors, about 200 barrels of diluent, a light petroleum product, was found in center tanks No. 4 and No. 6. Because these tanks were segregated for clean ballast the Terminal ordered the Vessel to cease discharging the ballast into the sea in order to avoid pollution and notified the United States Coast Guard. Although the Master opined that the contaminent had entered the tanks through defective butterworth gaskets, the Coast Guard suspected that fractures in the 4/5 and 5/6 transversal

bulkheads had permitted the diluent to enter No. 4 and No. 6 center tanks from No. 5 center, which had contained this type of cargo on the previous voyage. Orders were issued by the Coast Guard that the Vessel was not to load No. 5 center and to arrange inspection in Philadelphia of the center No. 4 and No. 6 tanks to determine the cause of the contamination. At 1600 hours on November 28th, the Master notified the Terminal that Vessel was ready to pump the contaminated ballast ashore. A ballast hose was connected at 2055 hours and discharge commenced at 2105 hours, completing at 0500 hours the morning of November 29th.

Following inspection at 0800 hours, the Terminal advised the Master that cargo would be ready at 1600 hours, whereupon the Master requested permission to hydrostatically test No. 5 center tank in the meantime with the objective of obtaining United States Coast Guard withdrawal of their order prohibiting the loading of this tank. The Coast Guard assented to this request and the tank was pressed up at 1330 hours. No inspection, however, was made by the Coast Guard because of advices received by the Master from his Owners of Charterers notification that the cargo was ready and all delays would be against the Vessel. The Vessel then pumped out the tank, completing at 1630 hours. A second tank inspection certificate was issued at 1730 hours with no retains noted. After changing hoses, the loading of the cargo started at 1925 hours. With intermittent delays, thereafter, caused by the 1% No. 6 oil not being ready and displacement and flushing of the loading lines, loading was completed at 0725 hours on December 1st. Hoses were disconnected at 0750 hours. Cargo documents were on board at 1700 hours and the Vessel sailed at 1800 hours. One hour prior to sailing, two statements for deadfreight in the amounts of 2,784.67 and 4927.67 long tons were served on the Terminal by the Master, the basis of both being the 39′ 00″ salt water arrival draft ordered by the Charterers and Vessel's DWT on this draft. The lower deadfreight amount discounted the 2,143 long tons which would have been loaded in No. 5 center. Owners, now, claim deadfreight in the lesser amount. According to the Chas. Martin report, sailing draft was 36′ 06″ forward and 35′ 04″ aft.

Volumes and tonnages of the two grades loaded were computed on shore tank and Vessel's measurements. The Bills of Lading, prepared by the shipper and signed by the Master, closely reflect the Vessel's measurements of the cargo.

	Bills of Lading	*Vessel*	*Shore Tanks*
	1/2% Sulphur		
Barrels	105,808.5	105,699.0	105,557.68
Long Tons	15,440.77	15,424.6	15,402.94
	1% Sulphur		
Barrels	189,365.67	189,379.	187,830.20
Long Tons	28,138.56	28,138.	27,862.99

The 1% sulphur cargo was stowed in tanks number 1, 2, 3, 8, and 10 port and starboard wings and No. 2 center and the 1/2% sulphur in tanks 4, 5, 6 and 7 port and starboard wings.

Enroute to Delair, No. 5 center was butterworthed in preparation for United States Coast Guard inspection.

The Vessel arrived at the Delaware breakwater at 1640 hours on December 6th, tendered at this time and proceeded to Mantua Anchorage, where she arrived at 1625 hours, December 7, 1983 for petroleum inspection; weighed anchor at 1845 hours and was all fast at the Hess Terminal in Delair, New Jersey at 2245 hours. Draft on arrival was 36′ 06″ forward and 37′ 00″ aft. Discharge of the 1/2% sulphur cargo started at 0210 hours on December 8th and completed at 0410 hours on December 9th with one interruption between 0610 hours and 0840 hours to discharge approximately 47,000 barrels of 1% sulphur cargo. On completion, 843.73 barrels of 1/2% sulphur remained aboard in wing tanks 4, 5, 6 and 7 port and starboard, as well as the balance of the 1% cargo.

During or after completion of discharge, No. 4 and 6 center tank transversal bulkheads were examined by the United States Coast Guard and found tight and the restriction on No. 5 center was accordingly lifted. The evidence presented is not clear as to whether No. 5 center or the adjacent center tanks were pressed up. Butterworthing of No. 5 center during the voyage indicates the latter.

At 0930 hours, December 9th, the Vessel sailed for Baltimore with a draft of 18′ 01″ forward and 30′ aft via the C. and D. Canal.

The Vessel arrived at the Hess Terminal in Baltimore at 2310 hours and commenced discharging at 0440 hours on December 10th. Draft on arrival was 18′ 05″ forward and 31′ 07″ aft. The cargo in wing tanks 4, 5, 6 and 7 port and starboard was found to have increased to 1573 barrels, which was said to have resulted from the crew circulating hot 1% sulphur cargo in these tanks to facilitate stripping the ½% sulphur retains.

At about 1600 hours on December 10th, Charterers' Loss Control Supervisor was notified that a crewmember had reported the existence of a concealed pipeline aboard the Vessel which was used to transfer cargo to the Vessel's fuel oil tanks.

Soon thereafter, Charterers initiated a thorough examination of the Vessel. Discharging was stopped by the Terminal at 1745 hours in order to allow sufficient time for Charterers' surveyors to examine the Vessel, which commenced at approximately 0900 hours on December 11th.

Guided by information from crewmembers, whose employment had been terminated, an irregular 3″ pipeline was found under the pumproom floor plates, welded into the return section of the No. 4 main cargo pump pressure relief piping, thereafter, penetrating the pumproom/engineroom bulkhead, beneath the floor plates and leading into the engine room where it was welded into the fuel oil pipeline system, adjacent to the fuel oil transfer pump.

Another irregular pipeline was found at the fuel oil distribution manifold which led to the reserve boiler feedwater tank.

The two irregular pipelines in effect joined the Vessel's cargo system with its fuel oil system, including access to fuel oil tanks Nos. 1 and 2 port and starboard, the settler tanks, No. 4 port and starboard double bottom tanks and the reserve feed water tank. This arrangement enabled cargo to be transferred to above tanks by gravity or the fuel oil transfer pump.

Further investigation revealed approximately 25″ of heavy black oil in the No. 4 starboard double bottom, which was found by Charterers' surveyors when they removed a manhole cover to permit visual examination and measurement from that location. The sounding taken in the sounding pipe showed the tank to be partially full with an oil and water mixture. Subsequent measurements indicated the sounding pipe was short ended and sealed off at the bottom.

The reserve feed water tank sounding pipe was found to be plugged with cement at the bottom, although soundings indicated a few inches of water and slop in the pipe. Removal of the manhole cover revealed a small amount of black oil in the tank, but oil stains indicated that it had been full or nearly so with fuel oil.

At about 0900 hours on December 11th, Charterers liened the Vessel for non-delivery of 2313.81 barrels of cargo in the amount of $30,000. During the same morning, Charterers' attorneys took depositions, ex-parte, from three departing members of the Vessel's crew, the Chief Officer, Second Officer and a riding repairman. The two deck officers testified as to the existence of the irregular lines and their use to transfer cargo into the bunkering system. The riding repairman testified in a similar vein, but less explicitly.

The Vessel resumed discharging at 0715 hours on December 11th and completed at 0940 hours.

Upon posting security in the District Court in the increased amount of $230,000, the Vessel was released at 2330 hours on December 11th and sailed for the Bahamas at 1045 hours on December 12th after experiencing delays said to have been caused by inclement weather.

The cargo retained on completion Baltimore was gauged by the Charterers' independent inspector and described as 843.73 barrels of free flowing oil, as determined by visual examination, warmer than the ambient temperature and free of grit and foreign matter. Owners' independent surveyor determined it to be 433 barrels of "unpumpable liquid" in all cargo tanks except No. 2 center, No. 5 center, No. 1 portside, No. 6 starboard and No. 10 starboard.

THE CLAIMS

Charterers

1) C. & F. value of 1774.85 barrels of 1% sulphur grade, said by Charterers to have been converted by Owners.			$ 53,443.74
2) C. & F. value of 843.73 barrels of cargo retained aboard completion discharge at Baltimore.			$ 24,890.03
3) Value of undelivered cargo on five previous voyages:			
(a) 3/21/78	3731 bbls.	$44,231.	
(b) 10/21/77	1572 bbls.	20,216.	
(c) 8/05/77	1009 bbls.	11,815.	
(d) 2/14/77	1078 bbls.	14,290.	
(e) 1/28/76	8013 bbls.	95,595.	
			$186,147.00
4) Appropriate interest on the above claims.			-
5) Punitive damages of three times the Award.			
6) Legal fees and expenses.			$141,670.91

Owners

1) Demurrage.	$ 37,998.86
2) Deadfreight.	$ 11,482.17
3) Interest on late payment of Partial Final Award.	$ 240.24
4) Attorneys' fees and expenses.	$172,648.99

Owners also request interest and all of the Panel's fees and cost of transcripts to be assessed against Charterers.

THE ARGUMENTS & DELIBERATIONS

The two irregular pipelines which interconnected the cargo pipeline and bunkering systems, including access to a con-

verted reserve feedwater tank, are central to the major claims in these disputes and give rise to the secondary claims.

The Owners do not deny the existence of the two irregular lines but argue that such lines were never used to convert cargo to the benefit of the Vessel. They argue that lack of certain spare parts for the stripping pumps compelled the installation by the crew of the 3" line in order to provide an alternate means of stripping the cargo tanks to assure complete discharge of cargo. The Owners also argue that the line was used to transfer slop from cargo tanks into fuel double bottom tanks for decanting purposes.

The Owners maintain that the 3" line was installed after the Vessel left the Asmar Shipyard on October 19, 1979 and, therefore, could not have been used to convert cargo on the previous voyages for which the Charterers have claimed for short deliveries. They deny that the 24" of oil found in No. 4 starboard was 1% sulphur cargo which had been converted. They maintain that it was comprised in the main of 1/2% sulphur oil which had been stripped from No. 5 center, after hydro-testing this tank in Delair for the United States Coast Guard, and remnants of bunker oil which had previously occupied the double bottom tank. Owners rely on expert witness testimony to refute Charterers' allegations as to the source of this oil. Moreover, Owners deny that the sounding pipe in No. 4 starboard had been short-ended and capped at the bottom in order to give misleading readings as to the tank's contents.

As to the cement plug found in the bottom of the sounding pipe to the reserve feed water tank, they maintain the plugging was done to prevent entry of noxious fumes from the tank into the engine room and that this was necessary because the damaged threads on the pipe prevented screwing a cap on the upper end.

The Owners further rely on the volumes as determined by Vessel's measurements on completion of loading and arrival and completion at the two discharge ports, as well as the shore tanks volumes in the loading and discharging ports, to demonstrate that no shortages had occurred and, therefore, there could have been no conversion of cargo.

The Owners also reject the Charterers' measurement of the short delivery, predicated on the difference between the Bills of Lading quantity, which was derived from the Vessel's loading ullages and the shore receiving tanks, as being contrary to the customary practice in the trade.

The Charterers challenge the Owners' assertion of purported temporary, innocent operational necessity for the irregular pipelines. They assert that the skillful installation of the 3″ line must have been completed in a shipyard and that such demonstrated its purpose as a permanent part of the Vessel's piping system. They further maintain that because it was located beneath the floor plates in the pump room and engine room, Owners intended to conceal the line. Charterers further assert that had the line been intended for the innocent purpose of a cargo auxiliary stripping system, its presence and use would have been declared and when not in use, its valves sealed, and that Owners had not done so. Charterers argue that, notwithstanding a possible necessity for stripping out No. 5 center with the irregular line, the Owners had no right to retain this oil, particularly since discharge had not been completed.

Charterers support their allegation of conversion by expert witnesses who testified and demonstrated by gas chromatography analysis of carbon ratios that the oil in No. 4 starboard double bottom was identical to the 1% sulphur and 90% of the oil in the reserve feed water tank came from the same source. Extensive physical and chemical qualitative analyses of the cargo, bunkers and the oil in question were cited to support Charterers' allegation.

The Panel finds the evidence overwhelming that the irregular pipelines were installed as a permanent part of the Vessels cargo system, for the purpose of diverting cargo into the bunker tanks. The skilled workmanship required for the installation, its concealment beneath the floor plates, its continued existence after stripping pump repairs, lend credence to this conclusion. Had the purpose of the irregular lines been innocent, a temporary rig would have been just as useful, cost far less and been easily removable after having served its temporary purpose. The Panel also takes due note of the depositions by the three departing crewmembers who testified that the 3″

line was used for converting cargo, although none admitted participation or first hand knowledge of such transfers.

The Panel finds the evidence most compelling that the Vessel converted 1% sulphur cargo for consumption in the boilers and that such took place after arrival in Baltimore. Acceptable evidence of such conversion prior to arrival in Baltimore is found to be lacking in that the cargo volumes, as measured in the tanks in each port up to arrival at Baltimore, remained consistent.

The Panel regards the testimony by the Charterers' expert witnesses and their exhibits, to be conclusive as to the source of the 273 barrels of oil in No. 4 starboard and the reserve feedwater tank being the 1% sulphur cargo.

Analyzing the consumption of fuel oil in the Vessel's boilers between arrival in Baltimore and completion of discharge and replenishment of bunkers, the Panel relys on the measurements taken by the Charterers independent and Terminal personnel to determine that the Vessel consumed an additional converted 452 barrels in her boilers during the stated period. The Vessel's fuel oil meter readings, which indicated a normal consumption in the boilers, contrasted starkly with the consumption of 15.88 barrels, indicated by soundings of bunker tanks, as consumed between arrival and completion of bunkering, a period of about 40 hours, during which Vessel heated and discharged about 145,000 barrels of cargo, in addition to the Vessels normal steam demands.

Consumption Of Bunkers As Measured In The Bunker Tanks

Fuel oil aboard on arrival Baltimore, December 10th, 0345 hours	2376.84 bbls.
Received in Baltimore, December 11th	9204.48 bbls.
TOTAL	11581.32 bbls.
Fuel oil aboard after completion of replenishment	11565.44 bbls.
CONSUMED IN BALTIMORE	15.88 bbls.

The conclusion is inescapable that the difference between the Vessel's actual consumption and the reported 15.88 barrels was taken from the cargo.

The Converted Cargo

Notwithstanding Charterers' claim for the value of 1774.95 barrels of 1% sulphur fuel oil, as derived from the difference between the Bills of Lading quantities and the quantities received in the shore tanks, less the retains of 843.73 barrels, the Panel believes that the true measurement of the converted cargo must be derived from the volumes calculated in the various bunker tanks and the consumption in the boilers after arrival in Baltimore.

Based on the testimony, fuel meter readings and their judgement, the Panel finds that the Vessel converted a total of 725 barrels of 1% sulphur cargo, having a value of $21,829.75. Although there has been an obvious misappropriation of Vessel's cargo, the evidence does not support conversion in the amount claimed by the Charterers.

Retained Cargo

Charterers have resubmitted their claim for the retained cargo in the amount of $24,890.03 for 843.73 barrels.

It is the Panel's opinion that a retained cargo claim, particularly when dealing with inches and fractions in tank bottoms, must be supported by innages from more than one location and laboratory analysis of representative samples to determine pumpability. Such supporting evidence is lacking.

The Panel rejects this claim.

The Undelivered Cargo On Five Previous Voyages

The Charterers have asserted a claim totalling $186,147.00 for short deliveries on five voyages, ranging from January 28, 1976 to March 21, 1978, some five to seven years prior to the extant claims. Although no claims for short delivery were asserted at the time, Charterers now say the shortages were caused by Owners' conversions of the missing oil.

The Owners deny Charterers allegations with the observation that conversion of cargo would have not benefited the Owners because the Vessel was under time charter to Corco during the period of the five voyages, which were actually voyage sub-lets from Corco to the Charterers.

Although the irregular 3" line was removed and disposed of by the Owners, no acceptable evidence was introduced to prove that this line existed at the time of the short deliveries. The Panel is reluctant to find for the Charterers in these claims without further and certainly more comprehensive evidence. The Panel further notes on each of the voyages, the Vessel lightened into a number of barges, before completing discharge at a terminal. Such types of discharges, of course, heighten the possibility of inconsistencies between shore and Vessel loading and receiving quantities. It is also noted on three of the voyages in question, the short delivery was under the customary ½% margin.

Therefore, under these circumstances, Charterers' claims for cargo shortages on the five previous voyages are rejected.

Punitive Damages

Charterers claim for triple the amount of the Award as punitive damages.

The Panel believes that the award of punitive damages is not within the intent and scope of the arbitrational process which is fundamentally grounded in the concept of equitable resolutions of commercial disputes. Moreover, there appears to be legal precedent which would deny arbitration panels the power to award punitive damages.

The Panel declines to make such an award.

The Demurrage Claim

The Owners claim demurrage for 4 days, 17 hours and 35 minutes at the Charter Party rate of $8,529.75 per day, for time used in excess of the 72 hours allowed for loading and discharging, totalling $40,368.23.

Because of the extraordinary circumstances surrounding these disputes, which directly impact upon the demurrage claim, the Panel has recalculated the demurrage, taking into

consideration the reasons for the delays and the above circumstances and events and awards demurrage to the Owners in the reduced amount of $13,920.07.

The Deadfreight

The Owners claim deadfreight in the amount of $11,482.17 (2,784.67 long tons × $4.12335) because of Charterers' draft restriction of 39 feet at the discharge port. Owners argue that the maximum Charter Party cargo of 49,875 long tons had been ordered and even with the elimination of No. 5 center tank, 2784.67 long tons more could have been loaded but for the draft restriction.

Charterers contest this claim, arguing that on completion, the Vessel was already by the head and any more cargo loaded in the only available space, in No. 2 center and No. 1 port and starboard, sufficient for about 534 long tons, would have put the Vessel so deep forward as to adversely affect her economical and efficient operation. Charterers further argue that even if all the certified tanks were 100% full, the available remaining cubic space would have been sufficient only for 1108 long tons.

The Charterers, moreover, contend that despite the elapse of some five hours after computation of cargo loaded, the Vessel did not request more cargo and, in fact, only issued a deadfreight letter 20 minutes before the pilot boarded on departure from St. Croix.

The Panel finds for the Charterers in disallowing this claim because of Vessel's failure to give timely notice to the Terminal for additional cargo. A deadfreight letter, issued 20 minutes before the pilot boarded, cannot be regarded as a timely request for more cargo. The fact that all tanks were full within operationally safe limitations with the exception of the three forward most tanks, provides evidence that the Vessel stopped the loading when the maximum pre-calculated trim by the head had been reached which is an additional reason to reject the deadfreight claim.

Charterers' Legal Fees and Expenses

Fairness and equity demand that the full amount of Charterers' legal fees, expenses and the cost of this arbitration be assessed against the Owners in light of the extraordinary circumstances which gave rise to this arbitration and the Panel so rules.

THE FINAL DECISION & AWARD

The Panel unanimously awards the following sums to the Charterers:

1) C. & F. value of 725 barrels of 1% sulphur cargo, converted by the Vessel.	$ 21,829.75
2) Interest on the above sum from Dec. 11, 1983 to April 30, 1985 at 11.6% per annum.	$ 3,510.46
3) Charterers' legal fees and expenses including the action in the Baltimore District Court and the cost of this arbitration.	$141,670.91
TOTAL DUE CHARTERERS	$167,011.12

Owners shall pay the full cost of the court reporter and their own legal and related expenses.

The Panel unanimously awards the following sums to the Owners:

1) Demurrage.	$ 13,920.07
2) Interest on the above sum from Jan. 11, 1984 to April 30, 1985 at 11.7%.	$ 2,079.32
3) Interest on withheld freight.	$ 240.04
TOTAL DUE OWNERS....	$ 16,239.43

This amount shall be set off against the sum due Charterers from Owners.

The sums awarded to Charterers are secured by a Letter of Undertaking, dated February 9, 1983 and issued by the Owners' Protection & Indemnity Association. If not paid within thirty (30) days of the date of this Award, interest shall resume on item No. 1 from the date of the Award until payment is made or the Award reduced to judgement, whichever first occurs.

This Award may be entered for judgement in the Court having jurisdiction.

The Panel's fees and expenses for rendering this Final Decision and Award are set forth in Appendix "A", attached hereto. It is the joint and several obligation of the parties the pay these fees and expenses.

/s/ ALEXIS NICHOLS
Alexis Nichols
Arbitrator

/s/ HARRY J. OTTAWAY
Harry J. Ottaway
Arbitrator

/s/ HENRY E. ENGELBRECHT
Henry E. Engelbrecht
Chairman

New York, New York
April 30, 1985

APPENDIX "A"

To The Arbitration Concerning the S/T "ATHENA", Charter Party dated August 26, 1983

The Panel sets it fees and expenses in the amount of $20,000.00, which is assessed in full against the Owners.

The Owners are promptly to pay each Mr. Alexis Nichols and Mr. Harry J. Ottaway the sum of $6,500.00 and Mr. Henry E. Engelbrecht the sum of $7,000.00.

If not paid within thirty (30) days, the sums due shall be paid by the Charterers who shall then have the right of claimover against the Owners.

New York, New York
April 30, 1985